UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONSERVATION LAW FOUNDATION, INC., *Plaintiff*, v. GULF OIL LIMITED PARTNERSHIP, *Defendant*.	Civil Action No. 3:21-cv-00932-SVN

PLAINTIFF CONSERVATION LAW FOUNDATION'S BRIEF
IN RESPONSE TO FEBRUARY 16, 2022 ORDER

Comes now, Plaintiff Conservation Law Foundation ("CLF"), and files this Brief pursuant to the Court's Order (ECF No. 60) dated February 16, 2022. As explained in more detail below, 1) the instant matter (the "Gulf action") is not related to *Conservation Law Foundation, Inc. v. Shell Oil Company, et al.*, No. 3:21-CV-933 (SALM) (the "Shell action") and therefore transfer to the same judge is unnecessary, and 2) if the actions are transferred to the same judge, consolidation pursuant to Federal Rule of Civil Procedure 42(a) would not be appropriate.

I. THE TWO CASES ARE NOT RELATED

The instant action is not "related" to the Shell action because (i) the parties in both cases are not the same, (ii) the cases have different facts, and (iii) even with similar legal theories, any rulings on those theories may still differ depending on the arguments and facts presented to the court in each case.

While the District of Connecticut Local Rules do not define "related case," a suitable analog has been adopted by the Eastern District of New York. *Guidelines for the Division of Business Among District Judges, Eastern District of New York* (Oct. 15, 2021), ("Guidelines"),

available at https://www.nyed.uscourts.gov/content/guidelines-division-business-among-district-judges. Rule 50.3.1 of the Guidelines defines a related case as one where, "because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a *substantial saving* of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1(a) (emphasis added). The Rule also defines when a case is *not* related: "A civil case shall not be deemed 'related' to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1(b). The word "related" here "requires a factually or transactionally related matter. Similar legal issues alone will generally not support assignment to the same judge." *Ukrainian Nat. Ass'n of Jewish Former Prisoners of Concentration Camps & Ghettos v. United States*, 205 F.R.D. 102, 103 (E.D.N.Y. 2001) (citing *United States v. Escobar*, 803 F. Supp. 611, 619 (E.D.N.Y. 1992); *Am. Direct Marketing, Inc. v. Azad Int'l, Inc.*, 783 F. Supp. 84, 87 (E.D.N.Y. 1992)). Here, the differences between the two cases outweigh any similarities.

First, the two cases involve different parties; only the plaintiff is the same in both cases. Meanwhile, the defendants in the two cases are very different. The instant case involves a single defendant based out of Wellesley, Massachusetts. The Shell action, on the other hand, involves multiple Defendants that are part of a complex, vertically integrated group of companies that make up the multi-national Shell plc group of companies—one of the largest oil companies in the world. The Shell matter will involve discovery and briefing on complex issues of higher-level corporate policy and control of the subsidiaries tasked with operating Defendants' bulk petroleum storage terminal in the Port of New Haven. Such issues are simply not present in the Gulf action.

Second, the two cases do not arise from the same facts or transaction. The cases involve two separate oil terminals. While CLF alleges similar Clean Water Act and Resource Conservation

and Recovery Act ("RCRA") causes of action based primarily on the defendants' failure to adapt their terminals to withstand the effects of climate change, the manner in which climate change will impact each terminal—*and therefore the bases for the alleged violations*—will differ depending on the physical characteristics of each terminal. *Compare* Gulf Compl. ¶¶ 63, 431 (ECF No. 1) (showing that Gulf's terminal has an area of approximately 13 acres and is located directly adjacent to the water near the mouth of the Quinnipiac and Mill Rivers) *with* Shell Amend. Compl. (ECF No. 47) ¶¶ 112, 476 (showing that Defendants' terminal has an area of approximately 38 acres and is located further from the rivers and more inland in the Port of New Haven); Gulf Compl. ¶¶ 69–72 (Gulf's terminal has bulk oil storage capacity of less than 10 million gallons) *with* Shell Amend. Compl. ¶ 115 (Defendants' terminal has bulk oil storage capacity of approximately 76 million gallons); Gulf Compl. ¶¶ 82, 85 (Gulf's terminal has two drainage areas and primarily discharges directly to New Haven Harbor) *with* Shell Amend. Compl. ¶¶ 123, 133, 455, 461 (Defendants' terminal has four drainage areas and discharges to the New Haven storm sewer).

Moreover, many of CLF's Clean Water Act claims, while alleging a violation of Connecticut's General Permit for the Discharge of Stormwater Associated with Industrial Activities, are specific to each terminal's Stormwater Pollution Prevention Plan, which also differ based on the specific physical characteristics, manner of operations, and management of the terminals. In fact, CLF has asserted four additional claims against Gulf that are specific to its terminal and Stormwater Pollution Prevention Plan. *See* Gulf Compl. (Count 12: Failure to Identify Outfalls in Stormwater Pollution Prevention Plan; Count 13: Failure to Monitor Discharges from Outfalls; Count 14: Illegal Infiltration of Stormwater; and Count 15: Failure to Maintain an Impervious Containment Area). While there may be some overlap of CLF's witnesses, the terminals in each case are owned, operated, and controlled by different defendants with different

employees, and therefore any commonalities are limited. In addition, much of the expert testimony will likely be specific to the defendants' planning, operations, and handling of the pollution generated at or discharged from these two distinct terminals. Accordingly, even if the same judge presides over both cases, the court will spend a considerable amount of time familiarizing itself with and distinguishing the facts of both cases, resulting in at most a *limited* increase of judicial efficiency rather than a substantial increase of judicial efficiency.

Finally, even if the legal theories in both cases are similar, the manner in which the legal issues will be presented to the Court will likely differ based on the defendants, rendering potentially divergent outcomes even before one judge because a court generally only rules on the arguments as they are presented to it by the parties. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (describing how the federal judicial system "rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present."); *compare* Defs.' Motion to Dismiss at 35–39 (ECF No. 41-1) (arguing the Court should defer to the state under the doctrine of *Burford* abstention) *with* Gulf Motion to Dismiss, Case No. 3:21-cv-00932-SVN, (ECF 43-1) (no argument that *Burford* abstention applies). And while familiarity with the Clean Water Act permitting regime or RCRA may assist a court in rendering a decision on the issues more easily, the same can be said for a court's familiarity with *any* permitting regime or statutory framework, such as claims brought under the Social Security Act, the Americans with Disability Act, and many others. There is therefore little judicial efficiency to be gained in a transfer of the case.

II. CONSOLIDATION OF THE TWO CASES IS NOT APPROPRIATE

Federal Rule of Civil Procedure 42(a) allows a district court to consolidate actions where they "involve a common question of law or fact." "The Rule should be prudently employed as a valuable and important tool of judicial administration, invoked to expedite trial and eliminate

unnecessary repetition and confusion." *Devlin v. Transportation Commc'ns Int'l Union*, 175 F.3d 121, 130 (2d Cir. 1999) (internal quotation marks and citations omitted). In determining whether consolidation is appropriate, courts usually consider the following:

> Whether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990) (cleaned up) (quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985)).

Here, any common questions of law and fact are overwhelmed by the differences as described above, such as the differing physical characteristics of the two terminals, the different manner of operation of the two terminals, the four additional claims against Gulf, and the complex corporate management structure of the Shell Defendants that has no parallel in the Gulf case. Consolidation of the cases is therefore more likely to create confusion and prejudice than it is to "eliminate unnecessary repetition and confusion." *Devlin*¸175 F.3d at 130.

In addition, to the extent a burden falls on the parties or witnesses by litigating two separate cases, that burden falls on CLF alone and is one that CLF anticipated and planned for in its filing of two unrelated cases. The burden on judicial resources is also likely to be similar whether the cases are consolidated or not; the many differing factual aspects of the cases mean a single trial will likely have too many factual offshoots to provide any real savings of time or expense to the Court or parties. Moreover, without the corporate complexity in the Gulf case, discovery is likely to proceed much more quickly than the Shell case and consolidation would unnecessarily prolong trial in this matter.

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For the foregoing reasons, CLF respectfully submits that the Gulf matter and the Shell matter are not related, and therefore transfer and consolidation are inappropriate.

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Respectfully submitted,

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